FILE COPY

Office Supreme Court, U.S.
FILED
NOV 23 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 541 14

B. T. SHELTON, for himself and others similarly situated; ARKANSAS TEACHERS ASSOCIATION, on its own behalf, and on behalf of its members; T. W. COGGS, as Executive Secretary of the Arkansas Teachers Association,

Appellants,

v.

ED. I. McKINLEY, JR., Chairman, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

STATEMENT AS TO JURISDICTION

J. R. BOOKER,
Century Building,
Little Rock, Arkansas.

THAD D. WILLIAMS,
800½ West 9th Street,
Little Rock, Arkansas.

ROBERT L. CARTER,
20 West 40th Street,
New York, New York,
Attorneys for Appellants.

HAROLD B. ANDERSON,
CHRISTOPHER C. MERCER,
GEORGE HOWARD, JR.,
of Counsel.

INDEX

	PAGE
Statement As to Jurisdiction	1
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement	6
The Question Presented Is Substantial	11
Conclusion	22
Certificate of Service	22
Appendix	23

Table of Cases

Aaron v. McKinley, 172 F. Supp. 944 (E. D. Ark. 1959)	12
Adler v. Board of Education, 342 U. S. 485	14
American Communications Association v. Douds, 339 U. S. 382	15
Barenblatt v. United States, 360 U. S. 109	14, 15
Beilan v. Board of Education of Philadelphia, 357 U. S. 399	14, 20

PAGE

Brown v. Board of Education, 374 U. S. 483 ..... 2, 13

Bryan v. Austin, 354 U. S. 933 2

Bryant v. Zimmerman, 278 U. S. 63 16

Cantwell v. Connecticut, 310 U. S. 296 17

Cooper v. Aaron, 257 F. 2d 33 (8th Cir. 1958) 6, 12

Evers v. Dwyer, 358 U. S. 202 2

Garner v. Los Angeles Board of Public Works, 341 U. S. 716 14

Konigsberg v. State Bar of California, 353 U. S. 252 14

Lerner v. Casey, 357 U. S. 468 ..... 14, 20

N.A.A.C.P. v. Alabama, 357 U. S. 449 16

Schware v. Board of Bar Examiners of New Mexico, 353 U. S. 232 17

Slochower v. Board of Education, 350 U. S. 551 14

Sweezy v. New Hampshire, 354 U. S. 234.. 13, 14, 16, 18, 19

United States v. Rumley, 345 U. S. 41 16

Uphaus v. Wyman, 360 U. S. 72 ..... 14, 15, 16

Wieman v. Updegraff, 344 U. S. 183 ..... 14, 17, 18, 20, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

B. T. SHELTON, for himself and others similarly situated; ARKANSAS TEACHERS ASSOCIATION, on its own behalf, and on behalf of its members; T. W. COGGS, as Executive Secretary of the Arkansas Teachers Association,

Appellants,

v.

ED. I. MCKINLEY, JR., Chairman, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

STATEMENT AS TO JURISDICTION

Appellants appeal from the judgment of the United States District Court for the Eastern District of Arkansas entered on June 8, 1959, holding that Act 10 of the Second Extraordinary Session, 1958, of the General Assembly of the State of Arkansas conforms to the requirements of the Fourteenth Amendment to the Constitution of the United States and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the United States District Court for the Eastern District of Arkansas is not yet reported and is set out in the appendix hereto *infra*, at page 23.

Jurisdiction

This action was instituted to enjoin and to restrain appellees from enforcing Act 10 of the Second Extraordinary Session, 1958, and Act 115 of the Regular Session, 1959, of the General Assembly of the State of Arkansas on the ground that these statutes contravened the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

The judgment of the District Court was entered on June 8, 1959 (R. 159), and notice of appeal was filed in that court on June 25, 1959 (R. 161). Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

By orders entered on August 3, 1959, September 16, 1959, and October 16, 1959, by Judge J. Smith Henley, one of the judges who heard this cause in the court below, the time in which to docket the appeal in this Court was extended to and including November 22, 1959.

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Brown* v. *Board of Education*, 347 U. S. 483; *Bryan* v. *Austin*, 354 U. S. 933, vacated as moot; *Evers* v. *Dwyer*, 358 U. S. 202.

Question Presented

Whether a state may require as a condition of employment of superintendents, principals, teachers, professors and instructors in the public schools and in public institutions of higher learning that such superintendents, principals, professors, teachers and instructors file an affidavit with appropriate school authorities listing the names of all organizations to which they belong and have belonged, or to which they have paid regular dues or made regular contributions for the past five years preceding, and not

limit such inquiry into organizational activities and associations which are concretely related to teacher fitness, competence or suitability for employment, without contravening those safeguards to academic freedom and freedom of association, protected against state interference by the Fourteenth Amendment to the Constitution of the United States.

Statute Involved

Act 10 of 1958

An Act to Provide Assistance in the Administration and Financing of Public Schools, and to Require Affidavits from Administrative and Professional Employees, Including Superintendents, Principals and Instructors of the Elementary and Secondary Schools, and Colleges and Universities of the State of Arkansas Relative to All Incorporated and/or Unincorporated Associations and Organizations to Which They Have Belonged or Have Been Affiliated With for the Past Five Years; to Provide Penalties for Failure to Comply, and for Other Purposes.

Be it Enacted by the General Assembly of the State of Arkansas:

Section 1. It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.

Section 2. No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other edu-

cational institution supported wholly or in part by public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor or professor is or within the past five years has been a member of, or to which organization or association such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions.

SECTION 3. Such affidavit may be in substantially the following form:

STATE OF ARKANSAS }
COUNTY OF ..... }

I, (name of affiant), being an applicant for the position of ..... at (name of school or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others:

(names and addresses of organizations)

and further, that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others:

(names and addresses of organizations)

.....
Signature of Affiant

Subscribed and sworn to before me this..... day of ....., 19 .....

.....
Signature and Title of Official

SECTION 4. Any contract entered into by any board of any school district, board of trustees of any institution or higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.

SECTION 5. Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), and in addition shall forfeit his license to teach in any of the schools, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this State. All penalties collected under the terms of this act shall be forwarded to the State Treasurer to be placed by him in the common public school fund.

SECTION 6. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitutionality shall

not affect any other portion of this act; nothing contained herein, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

SECTION 7. It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

Statement

In August, 1958, the Governor of the State of Arkansas called a Second Extraordinary Session of the General Assembly to deal with the decision of the United States Court of Appeals for the Eighth Circuit in *Cooper* v. *Aaron*, 257 F. 2d 33, concerning desegregation of public high schools in Little Rock, Arkansas.

One of the measures enacted at this extraordinary session was Act 10 here at issue. This statute provides that no person shall be employed in a teaching capacity in any public school or public institution of higher learning in the State of Arkansas until he shall have submitted in affidavit form to appropriate school officials a list of organizational associations and relationships for the preceding five years. Any contract entered into without the prescribed affidavit being executed was rendered void; no public monies could be paid to any person not executing the affidavit as compensation for services; and a false affi-

davit was declared to be perjury, subjecting the offender to loss of license and a fine of from $500 to $1000.[1]

---

[1] Act No. 115, not at issue here, was passed at the Regular 1959 Session of the General Assembly and made persons who belonged to the National Association for the Advancement of Colored People ineligible for public employment. The instant proceedings sought to enjoin enforcement of both Act 10 and Act 115. The court struck down Act 115, but upheld the constitutionality of Act 10. The provisions of Act 115 follow:

ACT 115 OF 1959

AN ACT TO MAKE UNLAWFUL THE EMPLOYMENT BY THE STATE, SCHOOL DISTRICT OR ANY COUNTY OR MUNICIPALITY THEREOF OF ANY MEMBER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND TO PROVIDE PENALTIES FOR VIOLATIONS.

WHEREAS, the National Association for the Advancement of Colored People has, through its program and leaders in the State of Arkansas, disturbed the peace and tranquility which has long existed between the White and Negro races, and has threatened the progress and increased understanding between Negroes and Whites; and

WHEREAS, the National Association for the Advancement of Colored People has encouraged and agitated the members of the Negro race in the belief that their children were not receiving educational opportunities equal to those accorded white children, and has urged the members of the Negro race to exert every effort to break down all racial barriers existing between the two races in schools, public transportation facilities and society in general; and

WHEREAS, the National Association for the Advancement of Colored People has made a strenuous effort to imbue the members of the Negro race with the belief that they are the subject of economic and social strangulation which will forever bar Negroes from improving their standard in life and raising their standard of living to that enjoyed by the White race; and

WHEREAS, the General Assembly believes that in view of the known teachings of the National Association for the Advancement of Colored People and the constant pressure exerted on its members of our States rests, and that the National Association for the advancement of Colored People is so insidious in its propaganda and the fostering of those ideas designed to produce a constant state of turmoil between the races, that membership in such an organization

[Continued on page 8]

All the evidentiary facts of significance in this appeal are undisputed. Appellant B. T. Shelton had taught in

---

[Continued from page 7]

is wholly incompatible with the peace, tranquality and progress that all citizens have a right to enjoy; and

WHEREAS, the Special Education Committee of the Arkansas Legislative Council has found that the National Association for the Advancement of Colored People is a captive of the international communist conspiracy;

NOW THEREFORE,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. It shall be unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State, school district, county or any municipality thereof, and such prohibition against employment by the State, school district, county or any municipality thereof shall continue so long as membership in the National Association for the Advancement of Colored People is maintained.

SECTION 2. The board of trustees of any public school or State supported college shall be authorized to demand of any teacher or other employee of the school, who is suspected of being a member of the National Association for the Advancement of Colored People, that he submit to the board a written statement under oath setting forth whether or not he is a member of the National Association for the Advancement of Colored People, and the immediate employer of any employee of the State or of any county or municipality thereof is similarly authorized in the case any employee is suspected of being a member of the National Association for the Advancement of Colored People. Any person refusing to submit a statement as provided herein, shall be summarily dismissed.

SECTION 3. A person dismissed from, or declared ineligible for, employment under the provisions of this act, may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause before any circuit court of the State why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of dismissal or ineligibility based on the provisions of this act. The hearing shall consist of the taking of testi-

[Continued on page 9]

the Little Rock Special School District for over 25 years prior to his discharge for refusing to execute the affidavit required by Act 10 (R. 83). There had been no complaint about his work heretofore, and prior to the enactment of Act 10 his teaching contract had been renewed in the latter part of each May, as was the custom, for the next ensuing school year (R. 88).

Appellant, the Arkansas Teachers Association, is an incorporated organization of Negro teachers of the State of Arkansas which seeks to aid in the educational advancement and professional growth of its members and protect their welfare (R. 64). At the time of the hearing below, the testimony reveals that 2,900 out of a potential of 3,200 Negro teachers in Arkansas were paid up members of this Association (R. 116). Appellant T. W. Coggs is the Executive Secretary of the organization and its chief executive officer.

[Continued from page 8]

mony in open court with opportunity for cross-examination. The burden of sustaining the validity of an order of dismissal or declaration of ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or declaration of ineligibility.

SECTION 4. Any person employing any individual contrary to the provisions of this act shall be subject to a fine of not exceeding one hundred dollars ($100.00) for each separate offense.

SECTION 5. All laws or parts of laws inconsistent herewith are hereby repealed.

SECTION 6. It has been found and is declared by the General Assembly of Arkansas that the National Association for the Advancement of Colored People has operated in the State of Arkansas in such a manner as to create a state of turmoil between the races, which is incompatible with the public welfare, and that enactment of this bill will tend to alleviate some of the adverse activities of such organization. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

APPROVED: February 24, 1959.

Each of the appellees is charged with the responsibility of employing public school teachers, supervisors, principals, instructors or professors in a public school or in a public institution of higher learning. Each is charged with responsibility for the enforcement of Act 10, and each has required all teaching personnel under its supervision and authority to file the affidavit called for by Act 10 as a prerequisite for employment.

On April 3, 1959, appellant Shelton, along with all other teachers and principals, received a memorandum from the superintendent of the Little Rock Special School District requesting him to comply with Act 10 and fill out an affidavit listing all the organizations to which he belonged and to which he had belonged during the past five years. Appellant was ordered to return the completed affidavit to his principal not later than April 13, 1959, and his principal was to alphabetize and file all the completed affidavits in the superintendent's office not later than April 14, 1959 (R. 85, 86). Appellant, who was admittedly a member of the National Association for the Advancement of Colored People (hereinafter referred to as the N.A.A.C.P.), refused to fill out the necessary affidavit, but filed a statement questioning the constitutional validity of the requirement that his associational relationships be revealed as a condition of his employment. On May 5, 1959, he was notified that his contract would not be renewed.

The instant proceedings were instituted on April 21, 1959, against the Little Rock Special School District, the Attorney General and the Prosecuting Attorney of Pulaski County (R. 4). At the hearing appellants consented to dismissal of the complaint as to the Attorney General and Prosecuting Attorney of Pulaski County. On May 2, 1959, an amended complaint was filed adding the Arkansas Teachers Association and T. W. Coggs, its Executive Secretary, as parties-plaintiff and the Pine Bluff Special School District, the President and the Board of Trustees of the Arkansas A. & M. College for Negroes as parties-defendant.

The suit was instituted as a class action under Rule 23(a) of the Federal Rules of Civil Procedure, and the constitutionality of both Act 10, involved in this appeal, and Act 115, passed at the Regular 1959 Session of the General Assembly, pursuant to which members of the N.A.A.C.P. were declared ineligible for public office, was before the court.

A hearing on the cause was held on May 25, and on June 8, 1959, the court below held that Act 115 was at war with the requirements of the Fourteenth Amendment and that membership in the N.A.A.C.P. could not be a valid basis for denying public employment. Act 10, on the other hand, was upheld and as to it, the complaint was dismissed with prejudice.

Subsequent to this decision, appellant Shelton was notified on June 16 by the Directors of the Little Rock Special School District that he had until June 25 to comply with the requirements of Act 10. Thereupon, appellant petitioned the Directors for an extension of time, which was denied, and on June 30, 1959, he was notified that he would not be issued a contract for the 1959-60 school term because of failure to file the affidavit required by Act 10. A stipulation to this effect was entered into by counsel for appellants and appellee, the Little Rock Special School District, and made a part of the record in this case.

The Question Presented Is Substantial

1. Act 10, the constitutional validity of which is in question here, requires as a condition of employment that a teacher in a public school or public institution of higher learning in Arkansas file an affidavit listing all organizational connections in respect to membership and contributions for a period embracing the preceding five years. This statute was a product of the Second Extraordinary Session of the General Assembly of the State of Arkansas which met on August 23, 1958, pursuant to a call from the

Governor, to enact legislation designed to deal with the problem of school desegregation posed by the decision of the United States Court of Appeals in *Cooper* v. *Aaron*, 257 F2d 33 (8th Cir. 1958).

At this session, in addition to Act 10, Acts 4, 5, 6 and 7 were also enacted. These statutes provide for the closing of schools in the event of their being under court order to desegregate; empower school officials to withhold funds from desegregated schools; provide public funds for private schools; permit the transfer of students from integrated to segregated schools; and provided for separate classes for Negro and white schools within a desegregated school. Of these, Acts 4 and 5 have been struck down as in conflict with the due process and equal protection clauses of the Fourteenth Amendment. *Aaron* v. *McKinley*, 173 F. Supp. 944 (E. D. Ark. 1959).

In addition to this legislation, Acts 12, 13, 14 and 16, designed to curb and restrict the activities of organizations which advocate desegregation, were enacted into law. These statutes require the disclosure of the names of the members of organizations; empower the Attorney General to seize organizational records and amend the barratry and champetry law so that it is now a criminal offense for organizations in Arkansas to sponsor litigation designed to bring an end to state imposed restrictions based upon race.

It seems clear, therefore, that Act 10 is a part of a legislative plan and design to maintain racial segregation in public institutions in the State despite the Fourteenth Amendment mandate to the contrary. The disclosure provision in Act 10 is an important element in this legislative plan and design in that this requirement will act as an effective deterrent to teachers in public institutions from maintaining links with or giving support to any organization advocating desegregation.

In order to make doubly certain that Act 10 would achieve this objective, at the subsequent 1959 Regular Session of the General Assembly, Act 115 was enacted making membership in the NAACP a disqualification for public employment. While this legislation was struck down by the court below, and appellees were enjoined from discharging appellant because of N.A.A.C.P. membership, the pernicious effect of Act No. 10 is not thereby removed. Merely because membership in a particular organization is not specifically made a barrier to employment does not save this law—its effect is as devastating as if Act 115 were still in effect.

It is obvious, appellants submit, that Act 10 will curb teachers in the exercise of rights of freedom of association. It will necessarily discourage their participation in or their giving support to any organization, however innocent, which is or is thought to be unpopular with their superiors. In view of the legislative history of Act 10, its clear intendment is to discourage teachers from joining or giving support to organizations, such as the N.A.A.C.P., which advocate desegregation and engage in activity aimed at accomplishing that objective, and from the teachers themselves voicing such ideas in the classrooms. Indeed, advocacy by the teacher of compliance with the law of the land as interpreted by this Court in *Brown* v. *Board of Education, supra,* is proscribed.

These reasons alone, appellants submit, are sufficient to render the constitutionality of Act 10 suspect and warrant review of the judgment of the lower court.

2. Act 10 is a sweeping interference with the exercise of the right of freedom of association and privacy in such association of teachers in public institutions in Arkansas. While exercise of this right in general is protected against state encroachment under the 14th Amendment, here not only is its general exercise at stake, but academic freedom as well. In *Sweezy* v. *New Hampshire,* 354 U. S. 234, 251,

Mr. Chief Justice Warren, speaking for four of the Justices of this Court, said he could conceive of no circumstances "wherein a state interest would justify infringement of rights" of the individual to academic and political freedom. Nothing in *Uphaus* v. *Wyman*, 360 U. S. 72, has modified the import of that statement.

Of course, the state is not powerless to make inquiries concerning the character, fitness, trustworthiness and suitability of public employees, including teachers. See *Adler* v. *Board of Education*, 342 U. S. 485; *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716; *Beilan* v. *Board of Education of Philadelphia*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 486; *Slochower* v. *Board of Education*, 350 U. S. 551. The mere fact that one is a public employee, however, does not afford the state the power to interfere with those constitutionally secured freedoms which the public servant would otherwise possess as a private citizen. See *Wieman* v. *Updegraff*, 344 U. S. 183; *Sweezy* v. *New Hampshire*, *supra*; Mr. Justice Frankfurter, concurring in *Garner* v. *Board of Public Works*, *supra*, at 724.

No issue in respect to subversion, loyalty or the power of the government to protect itself against overthrow by violence is involved here. While decisions of this Court might support an inquiry into past and present membership in the Communist Party as a relevant factor bearing upon the character, fitness, trustworthiness and suitability of a public employee, see *Garner* v. *Los Angeles Board of Public Works*, *supra*, those cases fall into a special category not relevant to decision where that issue is not present, as is the situation in this case. See *Barenblatt* v. *United States*, 360 U. S. 109.

The court below, appellants respectfully submit, fell into fatal error in reasoning that because association in subversive organizations has been held relevant to a determination of fitness for public employment, the sweeping

inquiry into associational relationships which Act 10 provides was permissible in determining teacher fitness. It said:

> While membership in a subversive organization, such as the Communist Party, is, of course, a relevant factor bearing upon a person's fitness for employment as a school teacher or college instructor, other factors are relevant as well. A school board in undertaking to select teachers is entitled to take into consideration not only an applicant's competency and loyalty, but also his or her personality, habits and manner of living and social, professional and political background and affiliations, to the end that it may select not only competent teachers, but those whose employment or retention in employment is to the best interest of all concerned.
>
> This does not mean, of course, that the Legislature can require a local school district or institution of higher learning to make inquiries of its employees or applicants for employment than are wholly irrelevant to their suitability for employment. (See Appendix, page 9)

Appellants respectfully submit that this reasoning misses the narrow basis upon which this Court has sustained interference with freedom of speech and of association where the question involves subversion and the right of the government to protect itself against overthrow by violence. In this area, because of the belief by the Court that subversion poses a grave danger to the existence of our society, or that the legislative judgment that such a danger is present cannot be disregarded, this Court has afforded government considerably greater leeway in taking steps to meet the danger there presented and has countenanced interference with freedom of speech and of association, which would not be permissible under other circumstances. See *Barenblatt* v. *United States, supra; Uphaus* v. *Wyman, supra; American Communications Association* v. *Douds*, 339 U. S. 382. It seems clear then that the rationale which

supports interference with speech, when the justification therefor is protection against subversion, will not sustain similar restrictions where no problem of subversion is present. Compare *Sweezy* v. *New Hampshire, supra*, with *Uphaus* v. *Wyman, supra*; and *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, with *Bryant* v. *Zimmerman*, 278 U. S. 63.

That the disclosure of associational relationships in the affidavit, which Act 10 requires teachers to fill out, constitutes an abridgement of freedom of speech and of association protected against state encroachment by the Fourteenth Amendment, absent a state interest compelling in nature to justify the intrusion, is no longer open to question. In *N.A.A.C.P.* v. *Alabama, supra*, this Court recognized inviolability of privacy in group associations as being indispensable to the preservation of freedom of association, protected against state interference by the Fourteenth Amendment to the Constitution of the United States. In *Sweezy* v. *New Hampshire, supra*, Mr. Chief Justice Warren said at page 250:

> Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment.

See also *American Communications Association* v. *Douds, supra*; *United States* v. *Rumely*, 345 U. S. 41; *Sweezy* v. *New Hampshire, supra*; *N.A.A.C.P.* v. *Alabama, supra*.

The substantiality of the state interest, as found by the court below, is its conceded right to determine character, fitness, trustworthiness and suitability of the public school teacher. But where that interest tends to collide with freedom of speech and of association, it can only be preserved in a narrowly drawn statute designed specifically to determine employee character, fitness, trustworthiness and suitability.

See *Cantwell* v. *Connecticut*, 310 U. S. 296. But Act 10, on the contrary, is not a narrowly drawn statute specifically designed to protect the integrity of the public teaching profession. It is a blanket invasion on the privacy of past and present associations of public school teachers as a class. As such, appellants submit, it cannot be sustained.

It can be argued that the listing here required is not punitive, and that the revelations which Act 10 makes necessary are not frought with adverse consequences, since Act 115 is not enforceable. It could be argued that the required disclosures amount merely to giving state officials information in respect to the teacher's private life. This does not meet the problem, however. There is no teacher tenure in Arkansas; teachers must merely be notified by a particular date each year that their contracts will not be renewed. Unless this is done, they are automatically entitled to a renewal of their contracts for the following year. Arkansas Statutes, 1947, Section 80-1304(b). Even with tenure, appellants submit, these disclosures could not be sanctioned, but their effect is necessarily far greater than would be the case if tenure were assured. Teachers in Arkansas must know that certain organizations are not favored, and that membership therein will be frowned upon by their superiors. They will not fail to understand that membership in a dissident organization could be the cause, albeit *sub silento*, of loss of job. They know that membership in or a contribution to an organization unpopular with their superiors is not wise. As a direct consequence, the natural tendency of the teacher will be to forego all organizational relationships except those which are certain to meet with approval. Moreover, the mere fact that employment can be discontinued at the close of the contract year without cause does not render discontinuation for a cause forbidden by the Constitution allowable, see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Konigsberg* v. *State Bar*, 353 U. S. 252; or that other inroads on the constitutional rights of an employee are permissible. See *Weiman*

v. *Updegraff, supra; Sweezy* v. *New Hampshire, supra.* ***supra.***

Mr. Justice Frankfurter, concurring in *Weiman* v. *Updegraff, supra,* pp. 195-197, has aptly described the role of the teacher and his relationship to the maintenance of freedom of thought and speech in our society. There he said:

> By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those, who like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. . . . That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
>
> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible

> citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their functions by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstances, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Mr. Chief Justice Warren, in *Sweezy* v. *New Hampshire, supra* at page 250, stressed the vital need for maintenance of academic freedom in a democratic society. While there the emphasis was upon freedom at the university level, it is even more apposite here where a state's entire public educational system is involved.

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.

In the academic field a sense of freedom is mandatory if the frontiers of knowledge are to broaden. A teacher, as the excerpts from the opinions of Mr. Chief Justice Warren and Mr. Justice Frankfurter demonstrate, operates in an area in which concepts and standards fundamental to a free society must be nurtured and fostered, if individual freedom is to be preserved. If teachers are fearful, afraid to be critical or inquisitive, and afraid to dissent, they cannot successfully impart to youth that thirst for knowledge or that freedom of spirit to question—a process of the mind and spirit essential to progress and growth in any society.

In short, the public interest in the inviolability of the privacy of teacher associations is certainly no less than that in respect to the private citizen. It is essential that a teacher be free to join and to participate in organizational activities of all kinds without regard to its popularity or general acceptance. Only where that organizational activity involves subversion as it relates to character, fitness, trustworthiness and suitability for employment has state interference therewith been deemed warranted. See *Beilan* v. *Board of Education, of Philadelphia, supra; Lerner* v. *Casey, supra.* Cf. *Wieman* v. *Updegraff, supra.*

The fact that Act 10 does not relate directly to the content of what is being taught in the classroom does not render the interference less pernicious, nor the invasion on academic freedom less serious. Act 10 subjects teachers to fear of the controversial and this deadening of spirit will necessarily affect the classroom performance. A pall is cast on the intellectual atmosphere of public institutions of Arkansas by this statute which tends to undermine intellectual curiosity and make a virtue of conformity.

Moreover, the stated objective of Act No. 10 as set out in Section 1 thereof is "to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds . . . ." Not only does this objective fail

to afford that compelling justification which must be demonstrated if this statute is to be sustained, but there is no reasonable relationship between that legislative objective and the requirement that associational relationships be disclosed.

3. The vital importance of the issue here posed is clearly manifest. What the State of Arkansas seeks to do by the enactment of Act 10 is to impose directly upon its citizenry a requirement of conformity. This the state is powerless to do under the federal Constitution. Ours is a free society—a society in which the freedom to disseminate ideas, freedom to think and freedom to dissent must be maintained if we are to preserve any esential difference between our democratic society and the totalitarian state. To allow state interference with the exercise of freedom of association and privacy therein by the public school teacher, without being related to character, fitness, trustworthiness and suitability, is to permit a deep inroad into freedom not permitted thus far under any decision of this Court.

This case is more far-reaching than *Weiman* v. *Updegraff*, *supra*. There the basis for the attempted intrusion, which this Court struck down, was membership in subversive organizations. Here even that limitation is absent, and disclosure is required of all organizational associations without regard to their character or purpose or their relation to teacher fitness. The power of the state to make such a sweeping restriction upon First Amendment rights poses an issue of great public importance which should be finally determined by this Court.

Wherefore, for the reasons hereinabove stated, this appeal should be granted and this Court should review the judgment of the court below.

Respectfully submitted,

J. R. Booker,
Century Building,
Little Rock, Arkansas.

Thad D. Williams,
800½ West 9th Street,
Little Rock, Arkansas.

Robert L. Carter,
20 West 40th Street,
New York, New York,
Attorneys for Appellants.

Harold B. Anderson,
Christopher C. Mercer,
George Howard, Jr.,
of Counsel.

Certificate of Service

I hereby certify that copies of this Statement was this day served by depositing same in a United States mail box, with first-class postage prepaid, to the following counsel of record:

Herschel N. Friday, Esq.
Boyle Building,
Little Rock, Arkansas

Louis L. Ramsay, Jr., Esq.
Simons National Bank Building
Pine Bluff, Arkansas

Dated: November 20, 1959.

Robert L. Carter.

APPENDIX

Memorandum Opinion and Judgment of United States District Court for Eastern District of Arkansas

(Filed on June 8, 1959)

PER CURIAM.

This is a class action in which the plaintiffs[1] seek declaratory and injunctive relief against the endorsement of Act 10 of the Second Extraordinary Session of the Arkansas Legislature, held in August, 1958, and of Act 115 of the regular 1959 session of that body. It is claimed that those statutes are violative of the First and Fourteenth Amendments to the Constitution of the United States. Upon the filing of the complaint, a statutory court of three judges was convened, and the case has been tried to that court.

Act 10 provides in substance that no person shall be employed or elected to employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions. The Act fur-

[1] The plaintiffs are: B. T. Shelton, a Negro school teacher employed in the Little Rock public school system; the Arkansas Teachers Association (ATA), a professional organization, the membership of which consists of Negro school teachers and college professors in the State of Arkansas; and T. W. Coggs, the Executive Secretary of ATA. The plaintiff, Shelton, sues for himself and others similarly situated; and the ATA and Coggs are suing for the benefit of members of the Association.

ther provides, among other things, that any contract entered into with any person who has not filed the prescribed affidavit shall be void; that no public moneys shall be paid to such person as compensation for his services; and that any such funds so paid may be reversed back either from the person receiving such funds or from the board of trustees or other governing body making the payment. The filing of a false affidavit is denounced as perjury, punishable by a fine of not less than five hundred nor more than one thousand dollars, and, in addition, the person filing the false affidavit is to lose his teaching license.

Section 1 of Act 115 makes it unlawful for any member of the National Association for the Advancement of Colored People (hereinafter called NAACP) to be employed by the State of Arkansas or any of its subdivisions, or by any school district, and declares that the prohibition of such employment shall continue so long as membership in the NAACP exists. Section 2 authorizes employing agencies to require from any employee an affidavit as to whether he is a member of the NAACP and a refusal to furnish the affidavit is made a ground for dismissal from employment.

Section 3 of the Act provides in substance that any person discharged from or declared ineligible for public employment on account of NAACP membership may, within four months of such dismissal or declaration, petition the circuit court for an order to show cause why a hearing on the charges against him should not be had; that until the final judgment on such hearing the dismissal or declaration of ineligibility shall be stayed; that the hearing shall consist of the taking of evidence with the right of cross-examination, and that the burden of sustaining the validity of an order of dismissal or declaration of ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or declaration of ineligibility.

The operative sections of this statute are preceded by a preamble, the gist of which is that the NAACP has been guilty of creating racial strife and turmoil in the State of Arkansas; that it has threatened progress in race relations in the State; that it has striven to stir up dissatisfaction and unrest among Negroes and that because of its purposes and activities membership therein is incompatible with the "peace, tranquillity and progress that all citizens have a right to enjoy." The preamble also contains a recitation that the Special Education Committee of the Arkansas Legislative Council[2] has found that the NAACP "is a captive of the international communist conspiracy".

When the suit was originally filed, B. T. Shelton was the only named plaintiff, and the original defendants were the Little Rock, Arkansas Special School District, the members of the Board of Directors of that District, and the Superintendent of Schools. Subsequently, an amended complaint was filed adding ATA and its executive secretary as plaintiffs, and adding as defendants the Pine Bluff, Arkansas, Special School District, the members of the School Board of that District and the Superintendent of Schools, and the Board of Trustees and President of the Arkansas A. M. & N. College for Negroes.

Also named as defendants were Bruce Bennett, Attorney General of the State of Arkansas, and Frank Holt, Prosecuting attorney of the Sixth Judicial Circuit of Arkansas, which includes Little Rock. Both the attorney general and the prosecuting attorney filed motions to dismiss, and at the commencement of the trial it was agreed that the complaint might be dismissed as to them without prejudice. Also named as members of the Pine Bluff School Board were Ralph Mitchell, Jr., and J. C. Langley. It developed

[2] The Arkansas Legislative Council is an agency of the Arkansas Legislature which functions during interims between sessions, makes studies of legislative problems, and reports thereon; to the Legislature.

that one of these gentlemen had never been a member of the Board, and that the other had resigned prior to the filing of the suit, and it was agreed that the case might be dismissed as to them.

Reduced to essentials, the claim of the plaintiffs is that the two statutes in question deprive the plaintiff Shelton and others similarly directed, and the members of ATA of liberty and property without due process of law, that they deny them the equal protection of the law; that they infringe upon their rights of freedom of speech, freedom of the press, freedom of assembly and association and to petition for redress of grievances, and deny them privileges and immunities of citizens of the United States. It is further claimed that Shelton and the plaintiff class are threatened with irreparable injury and have no adequate remedy at law.

In their answers the defendants deny the claim of the plaintiffs that the statutes are unconstitutional; they further contend that this court is without jurisdiction, and that this is not a proper class action. In the alternative, they ask that proceedings herein be stayed until the two statutes can be construed by the Arkansas state courts.

It appears that plaintiff Shelton has been employed as a teacher in the Little Rock Public School System for a number of years, and that he is a member of the NAACP; that on April 3 of the current year he and other teachers in the Little Rock system were called upon to submit the affidavits required by Act 10; that he declined to do so on the ground that the statute violated his constitutional rights; and that subsequently he received a letter signed by three members of the Little Rock School Board advising him that his contract had not been renewed for the 1959-60 school year and would not be renewed. By reason of a somewhat peculiar situation that existed with respect to the Little Rock School Board when the suit was filed and on the day of trial, which situation we find it unnecessary to detail,

there is some uncertainty with respect to the exact status of Shelton's contract and those of certain other teachers who declined to submit the Act 10 affidavits. It has been stipulated, however, that the Little Rock School Board will act in conformity with ruling State statutes, and it is plain that if those statutes stand, Shelton will inevitably feel their impact if he has not already done so. Thus, we are satisfied that Shelton's situation presents a case or controversy between him and the Little Rock School District with respect to which this court has jurisdiction.

The claim that this is not a proper class action calls for no extended comment, since it is now well settled that a suit of this kind, while not a "true class action" can be maintained for the benefit of the named plaintiff and "others similarly situated" under the provisions of Rule 23, F. R. C. P., 28 U. S. C. A. (See the full discussion of such an action and of the effect of a judgment therein contained in 3 Moore's Federal Practice, 2d Ed. pp. 3442-50, 3455-56, and 3465-68).

With regard to the contention that this court should not proceed herein until the statutes have been construed by the State courts, we of course, respect the doctrine of "equitable abstention", as it is sometimes called, and it has been applied in this district not infrequently. However, this doctrine is discretionary in its application, not jurisdictional. We see no problems of statutory construction in this case which would move our discretion to stay proceedings as the defendants desire. Cf. NAACP v. Patty, D. C., Va., 159 F. Supp. 503; see also dissenting opinion of Judge Parker in Bryan v. Austin, D. C., S. C. 148 F. Supp. 563, 567. Moreover, this is contract time with the school districts in Arkansas. Both teachers and directors of those districts need to know where they stand with respect to both acts. Should proceedings herein be stayed, inevitably there would be undesirable delay and confusion likely to be accompanied by a multiplicity of suits in various sections of

the State. Accordingly, we are of the view that the public interest calls for a determination of the Constitutional question presented by the record.

While there is certain language in the complaint that may indicate that the plaintiffs feel, at least to a certain extent, that the two statutes must be read together, we feel that they should be considered separately. Cf. Garner v. Los Angeles Board of Public Works, 341 U. S. 716, 720. And in view of certain decisions of the Supreme Court presently to be mentioned, we are satisfied that Act 10 is contitutional. On the other hand, it is clear that Act 115 is unconstitutional.

Act 10, unlike Act 115, does not make past or present membership in any organization a ground for discharge of or for refusal to employ a school teacher or college professor. It simply requires the local school boards and the governing bodies of institutions of higher learning to ascertain the affiliations of their respective faculties. Once that information has been furnished, so far as Act 10 is concerned, the local board or the governing body of a college is free to take any action it may choose with respect to the employment status of a given individual.

A public employer has a right to know the organizations to which its employees, including school teachers, belong or have belonged, or to which they are making or have made financial contributions. This right has been recognized in Garner v. Board, supra; Adler v. Board of Education of the City of New York, 342 U. S. 483; Beilan v. Board of Education, School District of Philadelphia, 357 U. S. 399; and Lerner v. Casey, 357 U. S. 468.

In the Garner case the Court, in upholding a requirement that public employees sign an affidavit revealing whether they had been members of the Communist Party or of the Communist Political Action Association, and if so setting forth the dates and periods of membership, said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may well have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment * * *." (341 U. S. at 720)

In Adler v. Board of Education of the City of New York, supra, there was before the Court a challenge of the New York statutes designed to clear subversives from employment in the public school system. It was claimed that those statutes violated the freedom of speech and assembly of persons employed or seeking employment in the public schools. The Court said: "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. Communications Assn. v. Douds, 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere * * *" (342 U. S. at 492). A little further on in the opinion, the Court, after announcing that it was adhering to the Garner case, supra, went on to state:

> "* * * A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the

officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." (342 U. S. at 493).

Garner and Adler were both adhered to less than a year ago in Beilan v. Board of Education, supra, wherein the Court upheld the discharge of a school teacher on account of his refusal to answer questions put to him by his superintendent relative to his communist affiliations and activities. The Court said:

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher." (357 U. S. at 405)

Further on in the same opinion the Court said that there was no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness, and that such fitness "depends on a broad range of factors." (357 U. S. at ——.) In discharging

their annual tasks[3] of selecting new teachers and determining which of the old ones should be retained in employment, Arkansas school boards and college trustees are not concerned alone with the professional training or instructional competency of their employees or applicants for employment, or even with their loyalty to this country. While membership in a subversive organization, such as the Communist Party, is, of course, a relevant factor bearing upon a person's fitness for employment as a school teacher or college instructor, other factors are relevant as well. A school board in undertaking to select teachers is entitled to take into consideration not only an applicant's competency and loyalty, but also his or her personality, habits and manner of living, and social, professional, and political background and affiliations, to the end that it may select not only competent teachers, but those whose employment or retention in employment is to the best interest of all concerned.

This does not mean, of course, that the Legislature can require a local school district or institution of higher learning to make inquiries of its employees or applicants for employment that are wholly irrelevant to their suitability for employment. Thus, in National Association for the Advancement of Colored People v. Alabama, 357 U. S. 449, cited by the plaintiffs, it was held that the Association could not be compelled by a State court to disclose its membership lists in connection with an action brought by the State on account of its alleged noncompliance with the

[3] In considering this case it is important to bear in mind that Arkansas, unlike certain other States, does not have any civil service system for its public school teachers. These teachers usually are hired on a year-to-year basis, and while a wrongful discharge during a school year in breach of contract is actionable, the only specific job security that a teacher has beyond the end of a year is the statutory provision that if a teacher is not notified within 10 days after the end of a school year that his contract has not been renewed, it is automatically renewed for the following year. Ark. Stats. 1947, Section 80-1304(b); Wabbasoka School District No. 7 v. Johnson, 225 Ark. 982, 286 S. W. 2d 841.

Alabama statutes dealing with foreign corporations. The Court said: "* * * The issues in the litigation commenced by Alabama * * * were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them". (357 U. S. at 464.)

We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. These are considerations of the legislative, not the judicial branch of the government. We hold, however, that the mere failure of a teacher who was a member of the National Association for the Advancement of Colored People, to furnish the affidavit required by Act 10 while Act 115 was ostensibly in effect, thereby making himself ineligible for public employment by the terms of the latter Act, did not and does not compel or justify his discharge or render him ineligible for re-employment.

Taking up Act 115, there can be no question that the Act makes any member of the NAACP ineligible for public employment in the State of Arkansas. Section 3 of the Act, which gives to any person dismissed from or declared ineligible for employment under the provisions of the Act, a right to petition for an order to show cause why a hearing on such charges should not be had, does not change or modify the command of the Act. That section gives one who was dismissed or denied employment on the ground that he was a member of the NAACP, and who claims that he was not a member, an opportunity to obtain a hearing on that issue alone. Once membership is established, then

discharge or a declaration of ineligibility automatically follows. Further, by the terms of the Act one who gives public employment to a member of the NAACP is subject to a fine of not more than $100 for each such offense.

Under the Fourteenth Amendment to the Constitution of the United States, as construed in Wieman v. Updegraff, 344 U. S. 183, and Slochower v. Board of Higher Education of the City of New York, 350 U. S. 511, the statute is clearly unconstitutional since it makes mere membership in the NAACP a ground for dismissal from or a declaration of ineligibility for public employment, regardless of whether the employee or applicant involved had any knowledge of or sympathy with the aims and purposes of the organization, as declared by the Legislature, or had actively participated in the activities found by the Legislature to be anti-social and undesirable, or whether he was completely innocent of such knowledge, sympathy or participation and had joined and was desirous of maintaining his membership in the Association out of sympathy with its publicly announced objectives which are clearly lawful.

Even if the recitals of the preamble to the statute to the effect that the NAACP is devoted to the creation of racial unrest and turmoil are taken at face value, there is no declaration that the purposes and activities of the organization are designed to overthrow the government or that they are violative of any statute.[4]

---

[4] See Judge Parker's discussion of a similar preamble to the South Carolina statute involved in Bryan v. Austin, supra. With regard to the statement that the NAACP is a captive of the communist conspiracy, it is to be noted that the Legislature did not find that such was a fact, but simply stated that a committee of the Arkansas Legislative Council had so found; and while the Attorney General of Arkansas testified at the trial of this case that the findings of that committee were before the Legislature when it adopted Act 115, he did not testify that the Legislature itself had ever adopted those findings as its own. Thus, it is unnecessary for us to decide whether the Legislature had a right to make such a finding, or to determine what effect should be given to it had it in fact been made.

While public employing agencies have a wide if not unlimited discretion in selecting their employees, it does not follow that the Legislature can by statute require such agencies to apply a wholly arbitrary and discriminatory standard in hiring and fixing. On the contrary, Wieman v. Updegraff and Slochower v. Board, both supra, establish that such cannot be done.

This Court, of course, cannot do otherwise than follow the decisions just mentioned. Wieman v. Updegraff involved the constitutionality of a statute of Oklahoma which required each state officer and employee, as a condition of his employment, to take an oath stating that he was not, and had not been for the preceding five years a member of any organization listed by the Attorney General of the United States as "communist front" or "subversive" and which statute, as construed by the State Supreme Court, barred persons from state employment solely on the basis of membership in such organization, regardless of their knowledge concerning the activities and purposes thereof. By an opinion in which all the Justices concurred, the Supreme Court held that the Act in suit, as thus construed, violated the Due Process Clause of the Fourteenth Amendment by making persons ineligible for public employment solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged. In so doing the Court distinguished its prior decisions involving state legislation aimed at safeguarding the public service from disloyalty, namely, Garner v. Board of Public Works, supra; Adler v. Board of Education, supra, and Gerende v. Board of Supervisors, 341 U. S. 56.

In the course of its opinion the Court said:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become

> a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy'. Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. We hold that the distinction observed between the case at bar and *Garner, Adler* and *Gerende* is decisive. Indiscriminate classification of innocent with knowing; activity must fall as an assertion of arbitrary power. The oath offends due process." (344 U. S. at 190-191).

And in Slochower v. Board of Education, supra, it was said:

> • • • • In Wieman v. Updegraff, 344 U. S. 183, we struck down a so-called 'loyalty oath' because it based employability solely on the fact of membership in certain organizations. We pointed out that membership itself may be innocent and held that the classification of innocent and guilty together was arbitrary. This case rests squarely on the proposition that 'constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary and discriminatory'. 344 U. S. at 192." (350 U. S. at 556)

See also Sweezy v. New Hampshire, 354 U. S. 234, 242, 251.

Since the fact of association alone cannot be used to determine disloyalty or disqualification, it is obvious that mere membership in the NAACP cannot be made a bar to public employment.

While the plaintiffs are entitled to a declaratory judgment to the effect that the State of Arkansas cannot constitutionally require that a person be discharged from public employment or be declared ineligible therefor merely because he belongs to the NAACP, from which it necessarily follows that public hiring officials cannot be successfully prosecuted for declining to follow such a standard, it does not follow that this Court, as a court of equity, can compel any school board to hire a person as a teacher, or to retain him in its employment, or to forbid it to discharge him. This is true because of the well settled principle that an equity court, at least in the absence of a statute or of a situation where an employee has a vested right to or interest in his employment, will not interfere by injunction with the power of an employer to determine whom he will employ or retain in his employment. As we have seen, school teachers in Arkansas have no vested rights in their jobs, and no right of re-instatement if wrongfully discharged. If a teacher is discharged in violation of his contract, his remedy is an action for damages. Such being the case, we do not believe that injunctive relief is appropriate here, nor, from a practical standpoint, do we think it necessary at this time.

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED:

1. That without objection the motions to dismiss filed herein by Honorable Bruce Bennett, Attorney General of the State of Arkansas, and by Honorable Frank Holt, Prosecuting Attorney of the Sixth Judicial Circuit of the State of Arkansas, are granted without prejudice.

2. That without objection the motions to dismiss filed by the defendants Ralph Mitchell, Jr. and J. C. Langley are granted.

3. That to the extent that the plaintiffs seek declaratory and injunctive relief with respect to Act 10 of the Second Extraordinary Session of the 61st General Assembly of the State of Arkansas, the complaint and amended complaint are without merit and are dismissed with prejudice.

4. That the prayer of the plaintiffs for declaratory relief with respect to Act 115 of the regular session of the 62nd General Assembly of the State of Arkansas be, and the same hereby is granted, and that said statute be, and it hereby is, adjudged to be invalid and unenforceable as contravening the Fourteenth Amendment of the Constitution of the United States.

Dated this ..... day of ....., 1959.

JOHN B. SANBORN
United States Circuit Judge

JOHN E. MILLER
United States District Judge

J. SMITH HENLEY
United States District Judge